Supreme Court, U.S.
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Case No.

IN THE
SUPREME COURT
OF THE UNITED STATES

October Term 1997

FELIPE B. CRUZ,
Petitioner,

vs.

WILLIAM S. COHEN,
Secretary, Department of
Defense, USA,
Respondent.

Petition For A Writ of Certiorari to the United States Court of Appeals For the Ninth Circuit; Appendix

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31 pp

Questions Presented

1.) Must a plaintiff in a Title VII retaliation case present "specific, substantial evidence of pretext" in response to an employer's proffered reasons for an adverse employment decision or else have his case dismissed?

2.) Does Section 102(c)(1) of the Civil Rights Act of 1991 grant a jury trial in actions against the United States of America?

3.) Is it proper to review the denial of a jury trial in a Title VII case under the harmless error standard?

4.) Where a written settlement agreement covers "all claims...arising from... the same subject matter that gave rise to [plaintiff's] lawsuit," must not extrinsic evidence be had to determine what claims are settled?

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Opinions Below

The Court of Appeals' opinions are not officially reported but they are reproduced in the Appendix as Exhibits A and B, pages fifteen and nineteen.

Jurisdiction

Jurisdiction of this court is based on 28 U.S.C. Section 1254, the power to review a final judgment of the United States Court of Appeals.

The trial court's jurisdiction was based on 42 U.S.C. Section 2000e, et seq., the power to hear an action for damages due to discrimination based on race and national origin, and to determine if retaliation for protected activity has occurred.

The Court of Appeals' jurisdiction was based on 28 U.S.C. Section 1291, the power to review a final judgment of the District Court.

Statutes, Constitutions, etc.

1.) 42 U.S.C. Section 2000e-3 makes it unlawful to discriminate against anyone who has complained of discrimination under the Civil Rights Act of 1964.

2.) The Civil Rights Act of 1991 provides in §102(a)(1) that persons may maintain an action for compensatory and punitive damages for intentional discrimination and that they may demand a jury trial. Section 102(c)(1).

Statement of the Case

This is the second of two appeals[1] taken by petitioner Felipe Cruz, who claims here that he was retaliated against by his supervisors for filing the first action for discrimination. (Cruz I and II.) Cruz is an auditor with the Defense Contract Audit Agency of the Department of Defense. He was a GM-13 when he took and passed the test for GM-14 on eight separate occasions, on the last of which he was one of three finalists. When he was not promoted, Cruz, after filing a charge with the Equal Employment Opportunity Commission, sued, claiming that he was discriminated against based on his race (Asian) and national origin (Filipino); he also claimed that his supervisor, Warren Wright, retaliated against him by lowering his performance and promotion appraisals ratings. These two charges -- the failure to promote and the retaliation for challenging the failure -- comprised the complaint in Cruz I.

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[1] This court denied Cruz's petition from the first appeal. 513 U.S. 1146, 115 S.Ct. 1093 (1995).

The appeal in Cruz I claimed that the trial judge, Manuel Real, erred in failing to find a prima facie case on the failure to promote and retaliation claims. The Court of Appeals for the Ninth Circuit in an unsigned memorandum opinion affirmed on the failure to promote claims, but reversed on the retaliation claim, stating that Cruz had shown "a pattern of retaliatory harassment." (Appendix, Ex. B.)

On remand, the parties settled Cruz I for $15,000 in papers drawn by the government, which agreement recites that it extends to "all claims...arising from the same subject matter that gave rise to the lawsuit." The agreement also provided that Cruz's ratings for 1993-1994 would be returned to their 1990 level, prior to Warren Wright's decreases.

In the meantime, Cruz had filed a second complaint alleging that almost all of the discrete acts of discrimination the Court of Appeals had found constituted a pattern of retaliatory harassment were in themselves actionable, Cruz II. Thus, the second complaint alleged seven acts of reprisal and one act of age discrimination for all of which Cruz listed EEOC docket numbers and for which he received right to sue letters in 1994 and 1996, after the Court of Appeals had reversed. That is, Cruz didn't even have the right to sue for the discrete acts of reprisal specified by complaint in Cruz II until after Cruz I had been tried and reversed on appeal. Yet, the government successfully moved for partial summary judgment that barred Cruz from litigating those claims in Cruz II

which the Court of Appeals in Cruz I had found established a pattern of harassment, even though they were not in themselves the subject of the action. However, the Court of Appeals in Cruz II found that the settlement agreement was unambiguous and included all those enumerated claims of Cruz II, even though Cruz could not have sued on them in Cruz I and despite the language of the agreement limiting it to what gave rise to Cruz I.

There remained after the government's partial summary judgment but three claims in Cruz II, one of age discrimination and two for reprisal in job ratings. As to these claims, Cruz had three times requested a jury trial, but Judge Real refused to grant one.

Accordingly, Judge Real, sitting as judge and jury, took evidence relating to Cruz's performance rating reduction in 1991-'92, and to the freeze of his promotion potential rating for 1992-'93. Insofar as relevant here, it is enough to note that Cruz's superiors -- Morimoto and McGrath -- both stated legitimate, nondiscriminatory reasons for their ratings, which Cruz, who tried the case himself, did not challenge by additional evidence of pretext.

On appeal, the Ninth Circuit held that, assuming Cruz had made a prima facie case, he had failed to introduce "specific, substantial" evidence of pretext, without which not even a jury could find in his favor. Accordingly, the court affirmed the judgment, finding the denial of a jury trial was harmless error.

Reasons To Grant The Writ

The Court of Appeals Decided A Federal Question Inconsistently With The Settled Law of This Court And Created A Split of Authority within the Ninth Circuit

A. Inconsistency

In holding that Cruz must supply "specific, substantial" evidence of pretext, the Court of Appeals departs from the settled law of this court.

The only "must" found in this court's opinions is that plaintiff must be given the "opportunity" to show that the proffered reasons of the employer are pretextual. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 804. There is no requirement in any Supreme Court case that plaintiff, when given the opportunity, must show "specific" and "substantial" evidence of pretext.

Indeed, Justice Scalia in a recent employment discrimination case states that rejection of the employer's proffered reasons is, together with proof of a prima facie case, enough to permit the trier of fact to find intentional discrimination, no other proof being required. St. Mary's Honor Center v. Hicks, ____U.S.____, 113 S.Ct. 2742, 2749. Again, the burden is limited by Justice Powell, who states that there may be cases where the prima facie case together with cross-examination of the defendant's witnesses will be enough

to discredit the employer's explanation. Texas Dept.of Community Affairs v. Burdine, 450 U.S. 261, 101 S.Ct. 1097, 1095, fn.10. Again, Justice Powell states that plaintiff's burden as to the employer's reasons merges with plaintiff's ultimate burden of persuasion which may be done directly, by persuading the court that intentional discrimination was the motivating factor, or "indirectly, by showing that the employer's proffered explanation is unworthy of credence." (Cits. omitted.) Id., at 1095. Is it not apparent that showing pretext is but one way of carrying the ultimate burden? Surely, if plaintiff were required to show pretext, either Justices Scalia or Powell would have said so.

(i)
The Issue Is
One of Credibility

Closely analogous to the points above -- that no independent evidence of pretext is necessary -- is U.S. Postal Service Bd. of. Govs. v. Aikens, 460 U.S. 711, in which Chief Justice Rehnquist shows that once a prima facie case is made and the employer has offered its reasons, without more, the trier of fact must then proceed to decide which party's explanation of the employer's motivation it believes. Id., at 716. And, indeed, Chief Justice Rehnquist adds that the trier of fact should not make its inquiry even more difficult by applying legal rules which were devised to govern the allocation of burdens and the order of proof. Id., at 716. The implication of such an observation is that the courts should not

add to the burdens established under McDonnell Douglas. Thus no extra requirement of specific and substantial evidence of pretext would appear to be warranted or contemplated under Aikens.

B.
There Is A Split of
Authority In The
Ninth Circuit

Another reason to grant review is the apparent difference in approach represented by Yartzoff v. Thomas, 809 F.3d. 1371, (1986) by Judge Dorothy Nelson, and Wallis v. J.R. Simplot, 26 F.3d. 885, by Judge T. G. Nelson, both of the Ninth Circuit.

In Yartzoff, Judge Dorothy Nelson holds that summary judgment where a prima facie case of discrimination is made under Title VII is generally unsuitable. Id., at 1377. In Wallis, however, Judge T. G. Nelson holds that the mere presentation of a prima facie case is by itself not enough to defeat a summary judgment. Id., at 890. And it is Wallis that the court of appeals relied upon because it quotes a case requiring specific, substantial evidence of pretext. Steckl v. Motorola, Inc. 703 F.2d. 392, 398 (9 Cir. 1983).

Yartzoff is consistent with this court's holdings in McDonnell Douglas, Burdine, and Aikens; Wallis is at odds. That Wallis notes cases in other circuits where more than a prima facie case must be made to defeat a summary judgment simply shows the spread of error and adds urgency to this petition. See cases collected in

Wallis, 26 F.3d., at 890; see also cases collected in University of Southern California v. Superior Court 222 Cal.App.3d. 1028, at 1039.

(i)
A Series of Retaliations
Shows Pretext

Finally, if Cruz was required to show pretext, Yartzoff indicates that the sheer number of retaliations -- 7 -- over a short period of time is itself probative of pretext. No more should have been required. Yartzoff, supra, 809 F.2d., at 1378.

II
The Right To Jury Trial And
The Review of Its Denial
Presents Important
Federal Questions

The irony of the circuit court's action in reviewing the denial of a jury trial here is that it relies upon the only other case to deny a jury, and find it harmless, because plaintiff failed to make a prima facie case. United States v. California Mobile Home Park Management Co., 107 F.3d. 1374, 1380 (9 Cir. 1997). The court here takes the rule and extends it to cover, not the prima facie case -- which its silence would indicate was made -- but to the failure to show evidence of pretext, which as Justices Scalia, Powell, and Rehnquist have been shown to hold is only one way of persuading the trier of fact of the ultimate conclusion -- discrimination, or not, that "elusive" of

inquiries.

We suggest that this cannot be deemed harmless error. As Justice Stevens observed, the jury trial right was granted in a package that responded to and reversed Supreme Court holdings, expanding the scope of relevant civil rights acts in order to provide adequate protection to victims of discrimination. Landsgraf v. USI Film Products, 114 S.Ct. 1483 (1994). Though the grant of a jury trial was not directly in response to any decision, still its presence in a remedial package suggests that it was meant to correct the narrow view the courts as trier of fact were taking. These views are now extended, as Wallis shows, to include cases where, despite a prima facie case, the action is dismissed for failure to introduce independent evidence of pretext. But, as Burdine, St. Mary's and Aikens show, where the employer proffers an explanation, only a question of credibility is presented. We suggest that the denial of a jury trial where a prima facie case is made can never be deemed harmless. Moreover, denial of a jury trial should be considered reversible per se. See, Selby v. McCarthy, 91 Cal.App.3d. 517, 527.

In summary, we can see no difference between the guarantee of a jury trial in a criminal case and the statutory grant in civil rights cases. The denial of either should be considered reversible per se.

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III
The Settlement Agreement Was Ambiguous

Finally, we wish to urge that as the settlement agreement referred without specifying the subject matter that gave rise to Cruz I, it necessarily required extrinsic evidence to determine its meaning. Here, the evidence was unequivocal that Cruz's attorney, and Cruz himself, thought they were settling only the failure to promote and the Warren Wright retaliation claims. Indeed when Cruz's attorney suggested a global settlement of all the claims then pending, the government attorney replied that he only had authority for $15,000, not $30,000. Further, Cruz's act of subsequently filing Cruz II shows that he did not believe those claims were the subject of adjudication in Cruz I.

We know this court does not usually grant review to correct a misapplication of a rule correctly stated. But, here, the circuit contradicts itself by stating that the agreement was unambiguous, and therefore no extrinsic evidence was necessary, yet the court then goes outside the document to identify the claims upon which Cruz had not gotten right to sue letters to include them in the settlement. That is, extrinsic evidence is necessary, and, if that is so, then it must admit all the extrinsic evidence bearing on the parties' intent and not merely that evidence favorable to the government.

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Conclusion

McDonnell Douglas, Burdine, Aikens and St. Mary's Honor Center all show that where a prima facie case of discrimination is made and the employer has proffered its reasons, the trier of fact should then proceed to decide the qustion of who it believes even in the absence of independent evidence showing pretext. No other evidence is needed, certainly not that the explanation is pretextual, as the mere rejection of the proffered explanation is enough to permit the inference of intentional discrimination. There is no presumption that the explanation offered is credible and the real reason, even if it is valid. Accordingly, the failure to introduce "specific" and "substantial" evidence of pretext was not fatal to Cruz's trial. Hence, the decision must be reversed for this reason alone, as it applies incorrect law.

Furthermore, even if the case were subject to a harmless error review, still the denial of a jury trial could not be considered harmless here as a fact question was presented between what Cruz showed and what the employer claimed.

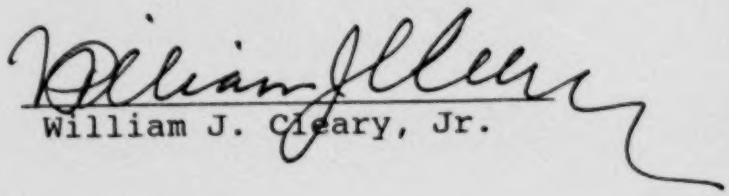
Finally,review should be granted because the court of appeals contradicted itself in holding that extrinsic evidence was unnecessary to interpret the settlement agreement, but at the same time looked outside the document to hold the claims on which Cruz had not yet obtained permission to sue were also barred. If the court admits the evidence favorable to

the government, it must also consider the extrinsic evidence favorable to Cruz.

For all these reasons, Cruz asks the court to grant the writ.

Date: July 16, 1998

Respectfully,



William J. Cleary, Jr.

Appendix

Exhibit A:
Opinion of the Court of Appeals.....15

Exhibit B:
Opinion of the Court of Appeals.....19

Exhibit A:
Opinion Of The Court of Appeals

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Filed May 8, 1998
Cathy A. Catterson, Clerk
U.S. Court Of Appeals

FELIPE B. CRUZ, Plaintiff-Appellant,	)	No. 97-55365 D.C. No. CV-96-1572-R
v.	)	MEMORANDUM*
WILLIAM S. COHEN, Sec'y. of Defense, UNITED STATES OF AMERICA, Defendant-Appellee	)	

Appeal from the United States District Court for the Central District of California
Manuel L. Real, Chief District Judge, Presiding

Submitted March 4, 1998**
Pasadena, California

Before: WIGGINS and KLEINFELD, Circuit Judges and SMITH, District Judge.***

* This disposition is not appropriate for publication and may not be cited to or used by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

Appellant Felipe Cruz appeals the district court's grant of partial summary judgment in favor of the United States on his Title VII and ADEA employment discrimination claims. Cruz contends that the district court erred in finding that claims brought in his second action against defendants were barred by a settlement agreement reached in an earlier action, and by denying him a jury trial. We have jurisdiction pursuant to 28 U.S.C. §1291, and we affirm.

I. Claims Barred by Settlement Agreement

The district court granted summary judgment on several of the claims in Cruz II on the ground that they were barred by settlement agreement in Cruz I. This court relies on local contract law to interpret settlement agreements. See Jeff D. v. Andrus, 899 F.2d. 753, 759 (9th Cir. 1989). Where the contract is unambiguous, no extrinsic evidence is admissible to contradict its meaning. See Pierce County Hotel Employees and restaurant Employees Health Trust v. Elks Lodge, 827 F.2d 1324, 1327 (9th Cir. 1987).

The settlement agreement in this case was unambiguous. It barred "all claims ...arising from...the same subject matter that gave rise to Cruz's lawsuit." Because both cases asserted discrimination and retaliation that occurred at about the same time at the DCAA, the Cruz II claims

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**The panel unanimously finds this case suitable for decision without oral argument. Fed.R.App.P.34(a) and Ninth Circuit Rule 34-4.

were barred by the settlement agreement regardless of whether they could have been litigated in Cruz I. The district court's grant of summary judgment was proper.

II. Right to a Jury Trial

A plaintiff suing the United States has a right to trial by jury only where Congress has "affirmatively and unambiguously granted that right by statute." See Lehman v. Nakshian, 453 U.S. 156, 169 (1981). Neither the ADEA itself nor any other statute contains such a grant. See id. at 168; Guillory-Wurz v. Brady, 785 F.Supp. 889, 891 (D. Colo. 1992). Cruz was therefore not entitled to a jury trial on his ADEA claim. We assume without deciding that Cruz was entitled to a jury trial on his Title VII retaliation claims.

A district court's failure to use a jury in a civil case is harmless error if, under the evidence presented at trial, no reasonable jury could have found for the appellant. See United States v. California Mobile Home Park Management Co. 107 F.3d. 1374, 1380 (9th Cir. 1997). In order to reach the factfinder, a plaintiff in a discrimination case must present specific, substantial evidence of pretext in response to the employer's proffered reasons for its adverse employment decision. See, e.g., Wallis v. J.R. Simplot Co., 26 F.3d. 885, 890 (9th Cir. 1994). Cruz failed to do so for either of

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***The Honorable Fern M. Smith, district Judge for the Northern District of California, sitting by designation.

his Title VII claims. Any error in denying his request for a jury trial on these claims was therefore harmless. **AFFIRMED.**

Exhibit B:
Opinion Of The Court of Appeals

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Filed September 9, 1994
Cathy A. Catterson, Clerk
U.S. Court Of Appeals

FELIPE B. CRUZ, Plaintiff-Appellant,	)	No. 93-55468 D.C. No. CV-92-03109-R
v.	)	MEMORANDUM*
LES ASPIN, Secretary of Defense, Defendant-Appellee	)	

Appeal from the United States District Court for the Central District of California
Manuel L. Real, Chief District Judge, Presiding

Argued and Submitted August 1, 1994
Pasadena, California

Before: D.W. NELSON, and NOONAN, Circuit Judges, and KING**, District Judge.

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* This disposition is not appropriate for publication and may not be cited to or used by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

Felipe Cruz ("Cruz") appeals the district court's dismissal of his Title VII discrimination claims against his employer, the Defense Contract Audit Agency ("DCAA" or "Agency"). Cruz, employed as a supervisory auditor (GM-13 level) at the DCAA, alleges that his advancement within the Agency repeatedly has been foiled in recent years, and that he has run into a "glass ceiling" based on his national origin (Filipino) and his race (Asian). Cruz asserts that, since 1986, he has been denied a promotion to a GM-14 position on at least eight separate occasions, and bases his present Title Vii challenge on the DCAA's denial in 1991 of his application for a promotion to the Office Manager position at the DCAA's El Segundo office. Cruz claims that the district court erred both in concluding that he failed to establish a prima facie case of disparate treatment, and in concluding that he failed to establish a prima facie case on his claim that his DCAA supervisors illegally retaliated against him for filing an EEOC complaint. We have jurisdiction under 28 U.S.C. §1291. We affirm in part, reverse in part, and remand for further proceedings.

I. FAILURE-TO-PROMOTE CLAIM

Cruz contends that the district court erred as a matter of law in concluding that he failed to establish a prima facie case of disparate treatment. We disagree.

**The Honorable Samuel P. King, United States District Judge for the District of Hawaii, sitting by designation.

Although certain portions of the transcript of the oral hearing on the Rule 52(c) motion support Cruz's position, after an independent review of the record we conclude that the district court's written finding that "Mr. Cruz presented no evidence that either race or national origin was a factor in Mr. Cruz's not receiving the...promotion," adequately supports the court's judgment. Cf. Kern Oil & Refining Co. v. Tenneco Oil Co., 792 F.2d. 1380, 1385-86 (9th.Cir. 1986) (noting that although a district court's findings are reviewed for clear error even where the court adopts a party's proposed findings verbatim, "'close scrutiny' of the record is appropriate" in such circumstances) (internal citation omitted), cert. denied, 480 U.S. 906 (1987).

At the oral hearing on the Rule 52(c) motion, the DCAA asserted that Cruz's failure-to-promote claim should be dismissed because Cruz had not "shown that he's more qualified for the position than Louis Bowers [the individual who was promoted]." After counsel for Cruz claimed that no such showing was required to establish a prima facie case, the court emphasized that "[Cruz is] not the only qualified applicant here. There are [seven]." The court appears to have accepted the employer's contention that a plaintiff in a failure-to-promote case must show that he or she was better qualified than the person who was promoted. If it were clear that the district court had accepted the DCAA counsel's argument and had based its ruling solely on Cruz's failure to

establish that he was better qualified than Bowers, we would have to reverse. We know of no disparate treatment cases imposing such a requirement. The test, rather, is whether the plaintiff has offered evidence sufficient to "'give rise to an inference of unlawful discrimination.'" Yartzoff v. Thomas, 809 F.2d. 1371, 1373 (9th.Cir. 1987) (quoting Texas Dept. of Community affairs v. Burdine, 450 U.S. 248, 253 (1981)). This burden can be met in a variety of ways, and the mere fact that a plaintiff who was denied a promotion cannot show that he was "more qualified" than the individual who received the promotion does not necessarily preclude him from successfully raising an inference of discrimination.

We uphold the district court's decision, however, because we agree that the evidence offered by Cruz failed to give rise to such an inference. It is true, as "Cruz emphasizes, that he introduced evidence showing that he was a member of a class protected by Title VII, that he was among those qualified for the promotion, and Bowers, a white male with roughly comparable qualifications, obtained the promotion. Cruz, however, introduced no evidence tending to show that the decision impermissibly was based on national origin or race. See Hagans v. Clark, 752 F.2d. 477, 481-82 & n.1 (9th.Cir. 1985) (stating that, in the sex discrimination context, regardless of whether the plaintiff has shown that a similarly qualified person of the opposite sex achieved the position, the plaintiff meets his or her prima facie case only by raising an inference that sex-based

discrimination likely motivated the promotion decision). There is no direct evidence of discriminatory motivation in the record and the circumstantial evidence introduced by Cruz actually undermines his contention that the DCAA's decision was discriminatory. Cruz testified that, as a general matter, DCAA employees who work in the Field Detachment, such as himself, are at a significant disadvantage when it comes to promotions. He also conceded that the only other Filipino to have applied for a GM-14 position, Zennie Pangilinan, had been promoted to such a position two years previously. Although these latter facts alone would not be sufficient to defeat an inference of discrimination if the inference were supported by other evidence, the record here is entirely devoid of such evidence.

II RETALIATION CLAIM

Cruz contends that the district court erred in concluding that he failed to establish a prima facie case of retaliation. We agree.

"A plaintiff may establish a prima facie case of retaliation by showing that (1) he engaged or was engaging in activity protected under Title VII, (2) the employer subjected him to an adverse employment decision, and (3) there was a causal link between the protected activity and the employer's action." Yartzoff v. Thomas, 809 F.2d. 1371, 1375 (9th.Cir. 1987). There is no question that Cruz's decision to file an EEOC complaint is a protected activity under Title VII. Cruz also established that his performance

rating dropped for the first time ever within months of filing the complaint, thereby carrying his burden of showing that he suffered an adverse employment decision. See id. at 1376 (stating that a performance rating drop constitutes an adverse employment decision within the meaning of Title VII). The only remaining question is whether Cruz's evidence established the necessary causal link between his EEOC filing and the adverse evaluation.

At the oral hearing on the Rule 52(c) motion, the district court suggested that Cruz's only evidence of a causal link was that Warren Wright, Cruz's immediate supervisor, had raised his voice against him. The court also suggested that it did not believe the testimony of Rogers, who had testified that Wright was out to get Cruz. The court did not, however, question the credibility of Cruz or of any of his other witnesses. In its written concludions of law, the court mentions only Wright's alleged "yelling" and the alleged impropriety of the investigation by the Inspector General's office. Cruz's evidence, however, was far more extensive. We conclude that, even disregarding the evidence discounted by the district court, that evidence establishes the causal link necessary to give rise to an inference of unlawful retaliation.

Cruz testified that, immediately after filing the EEOC complaint, he informed Wright of his action. Cruz claimed that Wright told him that he "didn't have any leg to stand on" and suggested that his rating could decrease

as a result of having filed the complaint. Cruz also detailed what he described as unusually close supervision from Wright and his successor and a pattern of retaliatory harassment in the ensuing months. He explained that, within two or three months of his filing of the complaint, Wright had his unit perform a special, time-consuming "floor check" despite considerable time pressure to finish scheduled audits. He further claimed that Wright gave conflicting instructions to him and the people working under him. He noted that one auditor was transferred out for 3-4 weeks in June 1991 and that another was transferred out permanently in July, leaving his unit shorthanded Finally, Cruz introduced evidence tending to show that his performance rating decrease was arbitrary. He testified that, prior to the filing of his EEOC complaint, Wright had given him a superior rating. He also testified that his rating was decreased despite the fact that he had completed 31 of 41 scheduled audits, whereas Roger Samuel, another supervising auditor at El Segundo who completed only 608 of 40 audits, did not have his rating decreased.

Under established Ninth Circuit precedent, this evidence suffices to establish the final element of Cruz's prima facie case of retaliation. See Yartzoff, 809 F.2d. at 1356 ("Causation sufficient to establish the third element of the prima facie case may be inferred from circumstantial evidence, such as the employer's knowledge that the plaintiff engaged in protected activities and the proximity in time between the protected

action and the allegedly retaliatory employment decision."). Accordingly, we reverse the district court's judgment in favor of the DCAA on Cruz's retaliation claim and remand the case to the district court. On remand, the DCAA should have the opportunity to present legitimate, nondiscriminatory reasons for its challenged actions. If it does so, Cruz must be afforded an opportunity to show that those reasons were pretextual and that the DCAA's actions were based on impermissible considerations. See St. Mary's Honor Center v. Hicks, 113 S.Ct. 2742 (1993).

III. JURY TRIAL

The Supreme Court's decision in Landgraf v. UDI Film Products, 114 S.Ct. 1483 (1994), forecloses Cruz's claim that he was entitled to a jury trial. Cruz concedes that the jury trial provision of the Civil Rights Act of 1991 would be applicable in this case only if the provision applies retroactively. In Landgraf, decided after the briefs were filed, the Supreme Court expressly ruled that the provision, set forth in §102 of the Act, does not apply retroactively.[2]

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[2] In his "Notice of New Authority," filed on May 27, 1994, Cruz makes the argument that "the rule [set forth in Landgraf] does not apply to cases arising in California." This argument borders on the frivolous. Cruz has presented no basis upon which this court conceivably could distinguish Landgraf.